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Nos. 800, 977

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1963

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HIGHWAY EXPRESS LINES, INC., ET AL., *Appellants*

v.

JONES MOTOR CO., INC.

---

PENNSYLVANIA PUBLIC UTILITY COMMISSION, *Appellant*

v.

JONES MOTOR CO., INC.

---

**On Appeal from the United States District Court for the Eastern District of Pennsylvania**

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## MOTION TO AFFIRM OF JONES MOTOR CO., INC.

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Pursuant to Rule 16, Paragraph 1(c) of the Revised Rules of this Court, Jones Motor Co., Inc. moves that the judgment of the District Court be affirmed.

## HISTORY OF THE CASE

The factual determination presented by this proceeding is before your Honorable Court for the second time. A brief chronological history is essential to an understanding of the issues.

On August 5, 1957, a Complaint against Jones Motor Co., Inc. was initiated by Pennsylvania Public Utility Commission before itself and docketed at Complaint Docket C. 16813. The Pennsylvania Commission heard its own Complaint, sustained it by its own decision and issued a Cease and Desist Order.

Jones then appealed to the Superior Court of Pennsylvania, which sustained the Pennsylvania Commission in *Jones Motor Co., Inc.* v. *Pennsylvania Public Utility Commission*, 188 Pa. Superior Ct. 449, 149 A.2d 491. Jones then filed its Petition for Allowance of Appeal with the Supreme Court of Pennsylvania at 123A, Miscellaneous Docket. Allocatur was refused.

Jones next filed its Petition for Writ of Certiorari with your Honorable Court and your Honorable Court granted the Petition and reversed the judgment of the Superior Court of Pennsylvania in *Jones Motor Co., Inc.* v. *Pennsylvania Public Utility Commission*, 361 U.S. 11.

Thereafter, the Pennsylvania Commission filed a Petition for Reconsideration and Clarification, praying your Honorable Court "to file a clarifying opinion or memorandum order expressly stating that the judgment of the Court below was reversed on jurisdictional grounds without regard to the merits of the controversy in the instant cause". A like Petition containing a similar prayer was filed on behalf of Intervenors in that proceeding (Appellants in Number 900 herein).

Your Honorable Court denied these Petitions for Reconsideration in *Jones Motor Co., Inc.* v. *Pennsylvania Public Utility Commission*, 361 U.S. 904.

The Pennsylvania Commission then filed a Complaint with the Interstate Commerce Commission docketed at MC-C-2732, naming Jones Motor Co., Inc. as Defendant. The Complaint averred that operations by Jones in transporting property between certain Pennsylvania points over routes lying partly in New Jersey were beyond the scope of its certificated authority and requested the issuance of a cease and desist order.

Of importance here, that Complaint was predicated upon the identical shipments of the identical property on the identical days from the identical consignors to the identical consignees involved in the prior proceeding determined by your Honorable Court in 361 U.S. 11 and 361 U.S. 904. By reason thereof, Jones Motor Co., Inc. filed with the Interstate Commerce Commission a Motion to Dismiss the Complaint, predicating the Motion upon the Doctrine of Res Adjudicata and on the merits. The Motion was denied and the matter was heard before an Examiner. The Motion to Dismiss was renewed at the hearing.

The Hearing Examiner in his Corrected Report and Recommended Order found that Jones Motor Co., Inc. was performing authorized transportation between points in Pennsylvania through points in New Jersey, recommended the dismissal of the Complaint on the merits, but denied the Motion to Dismiss.

After Exceptions, the Interstate Commerce Commission, through its Division 1, adopted the Findings of Fact of the Examiner, but reversed, concluding that the transportation performed by Jones constituted a subterfuge and was not authorized. A Petition for Reconsideration and Oral Argument filed by Jones was denied, whereupon Jones filed its Complaint in the United States District Court for the Eastern District of Pennsylvania.

The Court below heard argument and reversed the Interstate Commerce Commission. *Jones Motor Co., Inc. v. United States and Interstate Commerce Commission*, 218

F. Supp. 133 (1963). Upon Petition, the Court below heard reargument and after reargument, affirmed its prior Order of reversal. *Jones Motor Co., Inc.* v. *United States and Interstate Commerce Commission*, 223 F. Supp. 835 (1963).

Appeals were filed by Highway Express Lines, Inc., Modern Transfer Co., Inc. and the Pennsylvania Commission. The United States did not appeal and the appeal of the Interstate Commerce Commission was dismissed on that Commission's Petition.

Despite the withdrawal of Appeal and the failure of the United States to Appeal, there has been filed a "Memorandum on Behalf of the United States and the Interstate Commerce Commission".

## STATEMENT OF FACTS

The facts as presented before the Interstate Commerce Commission are not in dispute, a matter upon which both the Hearing Examiner and the Court below commented.

The following stipulations of fact appear of record:

> "it is admitted by Respondent that the transportation referred to in Paragraphs 4 to 25, inclusive, of the Complaint was performed by Respondents. It is agreed that the routes employed were as follows: From Philadelphia, Pennsylvania, over U. S. 1 to Trenton, New Jersey; thence over New Jersey 69 to Clinton, New Jersey; thence over U. S. 22 to Allentown, Pennsylvania. This same route was operated in the reverse direction as well.
>
> It is further agreed that: (1) Clinton, New Jersey, is within 35 miles of Princeton, New Jersey; (2) points in the Allentown area, except Easton, Pennsylvania, and Bethlehem, Pennsylvania, mentioned in this Complaint are all within 25 miles of Allentown and were served as off-route points via the same route set forth above; (3) Easton, Pennsylvania, and Bethlehem, Pennsylvania, were served as intermediate points on

In contrast, Jones Motor Co., Inc. presented the following unrefuted evidence to establish the lawful nature of its operation under its valid interstate Certificates:

1. Its base Certificate at MC-4963 (Exhibit 3) and its Certificate at MC-4963, Sub 7 (Exhibit 4).

2. Testimony indicating the portions of the base Certificate and the Certificate at Sub 7 relied upon to support its contention that the grants of authority properly were tacked (N.T. 62-66).

3. The Report of the Commission by Division 4 at MC-F-4955, which authorized the acquisition by Jones Motor Co., Inc. of its present Sub 7 authority and which *specifically authorized the combination* of the Sub 7 authority with the other interstate authorities of Jones in the following words:

> "Upon consummation of the purchase, Jones Motor Co., Inc., will be entitled to operate under the operating rights granted in No. MC-108161, *which rights are herein authorized to be unified with rights otherwise confirmed in it* and to be embraced in a certificate in its name, with duplications eliminated;" (Emphasis supplied) (Exhibit 5; Sheet 7).

4. That all of the shipments referred to in Paragraphs 4 to 25 inclusive of the Complaint were handled over the route set forth in the stipulation hereinbefore mentioned in reliance upon the tacking of authorities contained in Exhibits 3 and 4 (N.T. 67) and specifically authorized by Exhibit 5 as quoted above.

5. The routes in question are published as interstate routes in Middle Atlantic Conference Tariff 16 (N.T. 69), and the rates charged and collected also are published in appropriate interstate tariffs (Exhibit 6).

6. Jones Motor Co., Inc. operates terminals at Philadelphia and Allentown, Pennsylvania (N.T. 69). During the period of its operation of the Sub 7 authority under

temporary authority and for a year and a half thereafter, during which time the Sub 7 authority was operated as an integral part of the Jones operation, a terminal was also maintained at Clinton, New Jersey (N.T. 69-70-71).

7. When the Clinton terminal was first used, it performed breakbulk functions, serving shippers in the North Jersey territory (N.T. 71). Subsequently, Jones discovered that the breakbulk operations could best be handled out of the Allentown terminal and it accordingly closed the terminal at Clinton, New Jersey. The route, however, still operates through Clinton (N.T. 71).

8. The operations over the route in question initially commenced on July 30, 1951 by virtue of temporary authority granted by the Interstate Commerce Commission at MC-F-4955 (N.T. 72), and were continued upon issuance of the Certificate at Sub 7, pursuant to the *express authority to combine* its routes as quoted above (Exhibit 5).

9. Jones, prior to, at the time of the Complaint, and since, has maintained solicitors at both the Allentown and the Philadelphia terminals and also had a solicitor in Trenton, New Jersey (N.T. 76). At the time covered by this Complaint, these solicitors solicited traffic for freight forwarders, for steamships, for export, for movement over the routes of Jones Motor, as well as for movement in connection with other lines for which through routes and joint rates are published (N.T. 76-77).

10. Jones presented Exhibits setting forth all the shipments mentioned in the Complaint and also detailing the other traffic moving in conjunction therewith on the same vehicles (Exhibits 7, 8, 9 and 10). These Exhibits reveal traffic handled for the same consignors and the same consignees, whose shipments were challenged by the Complaint (N.T. 97). All of this traffic destined to points intermediate between Philadelphia and Allentown was delivered by peddle runs in the daytime operating out of

the respective Allentown and Philadelphia terminals (N.T. 101; 99-100-101).

11. The transportation referred to in Paragraphs 4 to 25 inclusive of the Complaint all took place at night (N.T. 83). Since it is a normal terminal-to-terminal operation, there were neither pickups nor deliveries made en route on those trips (N.T. 84).

12. In contrast, Jones Motor Co., Inc. presented as Exhibit 12 a traffic study showing pro numbers, dates, origins, destinations, descriptions and weight of certain traffic moved during the same period of time covered by the Complaint on which deliveries were made while the vehicles were en route, as well as deliveries made from the respective Allentown and Philadelphia terminals (Exhibit 12; N.T. 108). This traffic also moved over the challenged route, in whole or in part (N.T. 114).

13. At no time did Jones Motor Co., Inc. make any effort to conceal its mode of operation over the considered route (N.T. 105). On the contrary, it followed its authorized routes (N.T. 67), published those routes in a proper routing guide (N.T. 69), published proper rates and charged and collected them (Exhibit 6) and handled the traffic concerned in conjunction with other interstate traffic (Exhibits 7, 8, 9 and 10).

The Hearing Examiner, who observed the witnesses and their demeanor, concluded from these facts that Jones Motor Co., Inc. possessed valid Certificates, properly combined them, properly conducted its operation over the challenged routes, had logical reasons so to do and that the Pennsylvania Commission failed to establish any subterfuge or bad faith. As the Court below indicated in both its decisions, there were logical, practical and feasible reasons from the standpoint of operating efficiency and economy for Jones to transport the challenged shipments over the route in question.

Significantly, the Interstate Commerce Commission adopted the facts found by the Examiner; admitted the

validity of the Jones' Certificates; admitted that the Certificates were properly combined, but reversed the Examiner.

The Court below commented upon these factors as follows:

> "It is interesting to note that the Commission in its Report at p. 612 adopted the Examiner's statement of the facts, and rulings on evidence, such as, his allowance of certain exhibits which proved the interstate character of the other 108 shipments commingled with the challenged 22 shipments from the same consignors destined for Pennsylvania points. Division 1 also agreed with the Examiner's finding that the tacking by Jones of its two interstate authorities was lawful and proper. (p. 613)" (218 F. Supp. 133, 137)
>
> * * *
>
> "The only testimony offered to prove bad faith or subterfuge were the statements by officers of the intervenors, Modern Transfer Co. and Highway Express Lines, as to the use of Pennsylvania routes by their companies because they were more logical and practical for *their* operation. Also, there was testimony by a Mr. Duffy who had a conversation with one of Jones' drivers who stated that he had been making the trip for approximately five years, five nights per week over the routes covered by the stipulation mentioned above. An investigator for the P. U. C. gave testimony which the Examiner regarded as merely cumulative to Mr. Duffy's testimony and unrelated to any data mentioned in the Complaint.
>
> "Apart from this testimony offered by the P. U. C. to support its position that Jones' routes were circuitous, and somewhat long, no direct evidence of bad faith on the part of Jones was offered by the P. U. C. *Service Transfer Co.* v. *Virginia*, supra, P. 175.[6]

[6] The Supreme Court dealt with this identical situation with these words:

> "* * * Aside from the testimony of highway officers as to the actual shipments, none of which is disputed, the Commonwealth's evidence consisted solely of maps substantiating its position that petitioner's routes were circuitous and often long, sometimes exceeding twice the shortest possible route. However, it offered no direct evidence of bad faith on the part of petitioner in moving its traffic through Bluefield, West Virginia.' (At Page 137).

"Conversely, Jones was specifically authorized to combine its Certificates in proceedings at MC-F-4955 by these words:

> 'Upon consummation of the purchase, Jones Motor Co., Inc., will be entitled to Operate under the operating rights granted in No. MC-108161, which rights are herein authorized to be unified with rights otherwise confirmed in it and to be embraced in a certificate in its name, with duplications eliminated * * *'[7]

"Jones also proved that it provided a complete and economical transportation service to its customers by Exhibits 7, 8, 9 and 10, which show that the same consignors are served at the same time on traffic going to other points and that all of this traffic can be picked up at one time. By this nightly terminal to terminal road run Jones can assure its customers morning delivery via local peddle runs which would be handled in the daytime because the businesses then would be open to receive freight (Ex. 12)." (218 F. Supp. 133, 137-138).

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[7] Modern Transfer Co., Intervenor herein, was a protestant to the aequisition by Jones of this Sub 7 authority (Ex. 5)." (At Page 138).

## ARGUMENT

### Res Adjudicata Requires That the Appeals Be Dismissed

Throughout this proceeding Jones Motor Co., Inc. has urged the dismissal of the Complaint on the basis of Res Adjudicata. It filed a Motion to Dismiss on that ground and the Motion was renewed and pressed at each step of the proceeding.

The identical shipments, without exception, not merely similar shipments, were before your Honorable Court in *Jones Motor Co., Inc.* v. *Pennsylvania Public Utility Commission*, 361 U.S. 11 and 361 U.S. 904. As previously stated, that other proceeding arose out of a Complaint by the same Pennsylvania Commission involving the identical traffic. The Pennsylvania Commission, after hearing its

own Complaint, issued a Cease and Desist Order which was appealed by Jones to the Superior Court of Pennsylvania. The Superior Court of Pennsylvania affirmed the Order of the Pennsylvania Commission, and on Petition for Allowance of Appeal filed by Jones with the Supreme Court of Pennsylvania, allocatur was refused.

Upon Petition for Certiorari, your Honorable Court reversed in *Jones Motor Co., Inc.* v. *Pennsylvania Public Utility Commission*, 361 U.S. 11, citing *Service Storage and Transfer Co., Inc.* v. *Commonwealth of Virginia*, 359 U.S. 171.

The Pennsylvania Commission then filed its Petition for Reconsideration and Clarification, praying your Honorable Court "to file a clarifying opinion or memorandum order expressly stating that the judgment of the Court below was reversed on jurisdictional grounds, without regard to the merits of the controversy in the instant cause". Your Honorable Court denied this and like Petitions filed by Intervenors in *Jones Motor Co., Inc.* v. *Pennsylvania Public Utility Commission*, 361 U.S. 904.

In *Service Storage and Transfer Co., Inc.* v. *Commonwealth of Virginia*, supra, the reversal by your Honorable Court revoked a fine which had been imposed. In the first *Jones* case, the action of your Honorable Court nullified a Cease and Desist Order, which most assuredly would not have been procedural or jurisdictional in its effect if not reversed. In the second *Jones* case, though expressly petitioned to declare the first *Jones* case to be jurisdictional merely, your Honorable Court ruled adversely to the Pennsylvania Commission.

Since neither the *Service Storage* case, supra, nor the two *Jones* cases were jurisdictional in their effect, the Doctrine of Res Adjudicata applies. This principle was succinctly set forth in *Southern Pacific R. Co.* v. *United States*, 168 U.S. 1 (1897), as follows:

> "The general principle announced in numerous cases is that a right, question, or fact *distinctly put in issue*

> *and directly determined* by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of *all matters properly put in issue and actually determined by them.*" (p. 48-49) (emphasis supplied)

**The Challenged Transportation Is Interstate Commerce**

The challenged transportation "between places in the same state through another state" constitutes interstate commerce, pursuant to Act of Congress and the decided cases thereunder.

The Congress of the United States has defined interstate commerce in Section 203(a)(10) of Part II of the Interstate Commerce Act (Title 49 U.S.C. Section 303(a)(10)) as follows:

> "The term 'interstate commerce' means commerce between any place in a State and any place in another State or *between places in the same State through another State*, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water". (Emphasis supplied)

This Section of the Act has been interpreted time after time.

The Interstate Commerce Commission gave recognition to the Congressional definition in *Dixie Freight Lines, Inc.*,

*Common Carrier Application*, 24 M.C.C. 780, wherein a question arose as to whether transportation from Atlanta, Georgia to Fort Benning, Georgia via Opelika, Alabama constituted interstate commerce. It decided that it did, the Commission stated:

> ". . . there can be no question but that property transported from Atlanta to Fort Benning via Opelika moves in interstate commerce. This is seen from the definition of that term in Section 203(a)(10) of the Motor Carrier Act of 1935, which reads as follows:" (Act cited) (24 M.C.C. 780, 782).

As recently as August 1, 1961, the Interstate Commerce Commission granted authority to a number of carriers to transport cement from producing origins in a specific state to destinations in the same state. *H. C. Gabler, Inc., Extension—Cement from Maryland and Pennsylvania Counties*, 86 M.C.C. 477. One of the carriers which secured such authority is Modern Transfer Co., Inc., one of the Appellants in Number 900. In the *Gabler* case, this carrier secured a Certificate at MC-118836 to transport cement from a producing plant at Northampton, Pennsylvania, to points in a number of states, specifically including Pennsylvania (86 M.C.C. 447, at 516).

The proceedings involving Atlantic Freight Lines, Inc., which concerned the identical statutory definition here at issue, is also worthy of note. There, as here, the Pennsylvania Commission instituted a Complaint before itself against the carrier, averring that transportation between two Pennsylvania points via an interstate certificated route traversing another state constituted intrastate commerce. After the Pennsylvania Commission had sustained its own Complaint, the Superior Court of Pennsylvania, on Appeal, sustained the Pennsylvania Commission.[1] The Supreme

[1] *Atlantic Freight Lines, Inc. v. Pennsylvania Public Utility Commission*, 163 Pa. Superior Ct., 215, 6 A. 2d 589.

Court of Pennsylvania refused allocatur and your Honorable Court denied certiorari. Atlantic Freight Lines, Inc. then filed a Petition for Declaratory Order with the Interstate Commerce Commission, which Commission took jurisdiction and found for Atlantic Freight Lines, Inc. *Atlantic Freight Lines, Inc.—Petition for Declaratory Order*, 51 M.C.C. 175.

The Atlantic Freight Lines litigation did not terminate with the Declaratory Order proceeding. The Pennsylvania Commission instituted an equity action in the Court of Common Pleas of Dauphin County, Pennsylvania, at Equity Docket 20008, Commonwealth Docket 2672.[2] In that proceeding, the Pennsylvania Commission entered into a Consent Decree, whereunder Atlantic Freight Lines, Inc. was permitted to operate between two Pennsylvania points via interstate routes of movement through another state.

Your Honorable Court has construed transporation between points in the same state via another state to be interstate commerce. In *Central Greyhound Lines* v. *Mealey*, 334 U.S. 563 (1948), a question arose to whether a New York State Tax applied with respect to operations beginning and ending at a point in New York State but which involved routes also traversing Pennsylvania. This Court stated:

> "It is too late in the day to deny that transportation which leaves the state and enters another state is commerce among the several states simply because the points from and to are in the same state" (334 U.S. 655-656).

In *Missouri Pacific Railroad Co.* v. *Roy Stroud*, 267 U.S. 404 (1925), the carrier operated two routes between Oxly, Missouri and St. Louis, Missouri. The first route was entirely located within the State of Missouri while the second

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[2] *Pennsylvania Public Utility Commission* v. *Atlantic Freight Lines, Inc.*, E.D. 20008, C.D. 267.

traversed a portion of Missouri and a portion of Illinois. A shipper sued the Missouri Pacific for damages under a Missouri Statute for loss resulting to it from delay in furnishing freight cars. In the course of the testimony, it developed that the shipper's traffic moved over the route traversing both Missouri and Illinois.

In its decision, this Court called attention to the penalties provided in the Missouri Statute and those in the Interstate Commerce Act, with reference to unreasonable preference or advantage and added "It is elementary and well settled that there can be no divided authority over interstate commerce, and that the acts of Congress on that subject are supreme and exclusive. Transportation from Oxly to St. Louis over the route partly within and partly outside of Missouri is interstate commerce" (267 U.S. 404, 408).

*Hanley* v. *Kansas City Southern Railway Company*, 187 U.S. 617 (1903), involved an effort by the State of Arkansas to fix the rates on traffic moving between points in Arkansas through what was then Indian Territory. The goods were shipped from Fort Smith, Arkansas for some 52 miles in Arkansas and nearly 64 miles in Indian Territory. The charge imposed by the railroad was higher than that prescribed by the Arkansas Commission. Mr. Justice Holmes, writing the Opinion of the Court, reviewed numerous cases, some of which declare the interstate nature of transportation between points in one state through another state and some of which make similar holdings with respect to the nature of commerce for tax purposes, and quoted Mr. Justice Field in *Pacific Coast Steamship Co.* v. *Railroad Commissioners*, 9 Sawyer, 253, as follows:

> "To bring the transportation within the control of the State as part of its domestic commerce the subject transported must be within the entire voyage under the exclusive jurisdiction of the State" (187 U.S. 617, 620).

*Cornell Steamboat Co.* v. *United States*, 321 U.S. 634 (1944), held that transportation by a towing operation from one port in New York to another port in the same State is regulated transportation, subject to the jurisdiction of the Interstate Commerce Commission, even when the operation traversed merely the border water separating New York and New Jersey and also conducted for part of the distance within the water boundaries of the second state. The statute governing water carriage is less specific in its definitions than that governing motor carriage. Section 302(h) of the Interstate Commerce Act (49 U.S.C. 902(h)) provides:

> "(h) The term 'transportation' includes the use of any transportation facility (irrespective of ownership or of any contract, express or implied, for such use), and includes any and all services in or in connection with transportation, including the receipt, delivery, elevation, transfer in transit, refrigeration or icing, ventilation, storage, and handling of property transported or the interchange thereof with any other agency of transportation".

Paragraph (i) of Section 302 of the Act (49 U.S.C. 902(i)) reads, in pertinent part, as follows:

> "(i) The term 'interstate or foreign transportation' or 'transportation in interstate or foreign commerce', as used in this part, means transportation of persons or property—
>
> "(1) wholly by water from a place in a State to a place in any other State, whether or not such transportation takes place wholly in the United States; * * *".

In holding that the transportation in question is interstate, and subject to regulation by the Interstate Commerce Commission, although under statutory language less specific than that in the case at bar, this Court said:

> "Parts I, II, and IV of the Interstate Commerce Act, relating respectively to regulation of rail carriers,

> motor cariers, and freight forwarders, explicitly or by judicial interpretation cover all shipments which pass through the territory of two or more states even though both terminal points are in the same state. And so if railroads or truckers should use tugs for the same purposes and over the same route as Cornell the movements would be interstate under the Act and subject to regulation by the Commission; and apparently the same is true of freight forwarders. From the language of Part III of the Act, its history, and its general purpose, we conclude that the Commission and District Court correctly decided Cornell's transportation through New York and New Jersey waters also is subject to regulation by the Commission" (321 U.S. 634, 640-641).

In *Western Union Telegraph Company* v. *Speight*, 254 U.S. 17, a suit was brought in the North Carolina courts against the telegraph company to recover damages for mental suffering caused by an error in delivering a telegraphic message. The message originated at Greenville, North Carolina, was destined to Rosemary, North Carolina, but was transmitted via Roanoke and Norfolk, Virginia. The jury found that the message was sent into Virginia from North Carolina for the purpose of fraudulently evading liability under North Carolina law. Nevertheless, the presiding Judge set aside the verdict as a matter of law and ordered a non-suit. On Appeal, the North Carolina Supreme Court directed that judgment be entered on the verdict.

In reversing, this Court stated: "The transmission of a message through two states is interstate commerce as a matter of fact. *Hanley* v. *Kansas City Southern Railway Co.*, 187 U.S. 617".

The most recent Opinion by this Court in interpreting the Section here in question was *Service Storage and Transfer Co., Inc.* v. *Commonwealth of Virginia*, supra. The history of that proceeding merits attention.

The Virginia Commission instituted a Complaint proceeding against *Service Storage and Transfer Co., Inc.* and after hearing, fined that carrier $5,000.00 for transporting ten shipments which the Virginia Commission contended were intrastate in nature and, hence, in violation of Chapter 12, Title 56 of the Code of Virginia. The Virginia Court of Appeals sustained the Virginia Commission on Appeal but reduced the fine. *Service Storage & Transfer Co.* v. *Virginia*, 199 Va. 797; 102 S.E. 2d 399.

The Virginia Commission in its Order (in Case Number 13074 decided June 9, 1956) indicated that *Service Storage* was transporting property, inter alia, between Roanoke and Wytheville, Virginia by way of Bluefield, West Virginia. This decision found the distance between Roanoke and Wytheville, Virginia by the shortest route, to be 80 miles and the distance by way of Bluefield, West Virginia, as traveled by *Service Storage*, to be 160 miles, or twice the distance. The Supreme Court of Appeals of Virginia made similar mention of this same transportation (199 Va. 797).

Both the Virginia Commission and the Virginia Appellate Court relied upon the question of circuity and the fact that the normal route would lie wholly within Virginia.

*Service Storage and Transfer Co.* filed a Petition for Declaratory Order with the Interstate Commerce Commission, at MC, 30471, which was decided in favor of *Service Storage* by Division 1 on March 29, 1957. In the course of the decision, Division 1 found the routes employed not unduly circuitous.

In the interim, *Service Storage* appealed the decision of the Virginia Court of Appeals to this Court, which granted Certiorari and found as facts the following:

1. The shipments originated at Virginia points and were destined to Virginia points but were routed through Bluefield, West Virginia (at Page 172).

2. *Service Storage* conducted its operations under Certificates issued by the Interstate Commerce Commission, combining two of these Certificates (at Pages 173, 174).

3. The Virginia State Corporation Commission had not issued any Certificate to *Service Storage* authorizing any intrastate carriage (at Page 174).

4. Virginia contended that subterfuge was to be found by virtue of the circuitous and unnecessarily long routes, often exceeding twice the shortest possible routes (at Page 175).

5. Virginia offered no direct evidence of bad faith on the part of *Service Storage* (at Page 175).

6. *Service Storage* offered evidence of its operations under its interstate Certificates as proof of the bona fides of its operations (at Pages 175, 176).

This Court reversed the judgment of the Court of Appeals of Virginia (and necessarily of the Virginia State Corporation Commission) and found for *Service Storage and Transfer Co., Inc.*, stating: "The Certificate on its face covers the whole operation" (359 U.S. 171, 177).

The prior *Jones* proceedings at 361 U.S. 11 and 361 U.S. 904, were decided on the strength of *Service Storage and Transfer Co., Inc.* v. *Commonwealth of Virginia*, supra.

**Appellants Did Not Meet the Burden of Proof of Subterfuge**

Though the Complaint specifically raised as an issue a subterfuge on the part of Jones Motor Co., Inc., no direct evidence of bad faith such as deceit, concealment, fraud, deception or artifice was presented. Moreover, in the absence of any element of subterfuge, the Commission has found it to exist.

The Court below, on the contrary, in its initial Opinion, recognized this fact when it found:

> "The only testimony offered to prove bad faith or subterfuge were the statements by officers of the inter-

venors, Modern Transfer Co. and Highway Express Lines, as to the use of Pennsylvania routes by their companies because they were more logical and practical for *their* operation. Also, there was testimony by a Mr. Duffy who had a conversation with one of Jones' drivers who stated that he had been making the trip for approximately five years, five nights per week over the routes covered by the stipulation mentioned above. An investigator for the P.U.C. gave testimony which the Examiner regarded as merely cumulative to Mr. Duffy's testimony and unrelated to any data mentioned in the Complaint.

"Apart from this testimony offered by the P.U.C. to support its position that Jones' routes were circuitous, and somewhat long, no direct evidence of bad faith on the part of Jones was offered by the P.U.C. *Service Transfer Co.* v. *Virginia*, supra, p. 175. (Footnote omitted) (218 F. Supp. 133, 137)

* * *

"The burden of proof on the subterfuge question is placed upon the P.U.C., not on Jones which admittedly is operating under validly combined Certificates. Since the Commission, in its Order, bottomed its findings of bad faith solely upon the circuity of routing by Jones after agreeing with the Examiner in most respects, we must reject this unwarranted conclusion and adopt the Examiner's 'Corrected Report and Recommended Order'." (At Page 138)

In its Opinion and Order on reargument, the Court below re-emphasized that the Interstate Commerce Commission's finding of subterfuge was not sustained by the evidence, when it stated: "The basis of our prior opinion and order was that the record failed to disclose substantial evidence to support the Commission's finding of subterfuge on the part of Jones" (223 F. Supp. 835, 836). The Court below then went on to indicate: ". . . we find no evidence of bad faith in the record of this proceeding" (At Page 836).

The District Court thus recognized that where subterfuge is at issue, the burden of proof thereof is imposed

upon the proponent of the proposition that subterfuge exists. The cases are in accord.

The Circuit Court of Appeals of the 9th Circuit in a cause involving purchase of corporate stock had before it a case where subterfuge was expressly alleged, as in the present case, but also like the present case, there was no affirmative evidence thereof. The Circuit Court of Appeals in reversing the lower court said:

> "There is nothing in the pleadings and certainly nothing in the evidence to support the contention that Appellant tried to keep anything from the knowledge of the Appellee or tried to get him to sign the letter by unfair means" *Los Angeles Fisheries* v. *Crook*, 47 F. 2d 1031, 1035.

Also of relevance here is *Camden Trust Company* v. *Gidney*, 301 F. 2d 521 (1962), cert. den. 369 U.S. 886, in which "manifest subterfuge" was alleged to have been practiced in arranging the opening of a banking facility where a competing bank was already in operation.

The Camden Trust Company, with principal office in Camden, N. J., had, since 1953, maintained a branch bank at Erlton, in Delaware Township, N. J. Delaware Township was evidently a desirable site for a bank and in 1960 the Haddonfield National Bank, Haddonfield, N. J., sought authority to locate its main office here, while retaining as a branch its Haddonfield office only two miles away. It was refused by Gidney, Comptroller of the Treasury. Thereafter, the Directors of Haddonfield National filed application for the incorporation of a new national bank in Delaware Township. Appellant, Camden Trust, objected, and when it appeared that the Comptroller would approve the new facility, action was filed in court by Camden Trust. Upon dismissal of the Complaint, Plaintiff appealed.

New Jersey law, as pertinent, provides that no bank shall establish or maintain a branch office which is located out-

U. S. 22 between Allentown, Pennsylvania, and Clinton, New Jersey; (4) Chester, Pennsylvania, is within the Philadelphia Commercial Zone; (5) Oaks, Pennsylvania, was served as a free astray from Philadelphia over route first set forth above; (6) Hatboro, Pennsylvania, was served via an unnumbered route between Hatboro and Philadelphia, Pennsylvania, and thence to destination over the routes first set forth above" (N.T. 16-17).

The free astray described in the foregoing stipulation was defined as a misplaced or lost shipment which subsequently appeared at the Philadelphia dock and was moved over the routes in question (N.T. 18).

Jones also stipulated that the transportation averred in Paragraphs 4 to 25 inclusive of the Complaint was not performed under any certificate issued by the Pennsylvania Commission (N.T. 19).

The distances and driving times over the routes in question and over other routes lying wholly within Pennsylvania also were stipulated, as follows:

"It is stipulated and agreed between counsel that if the witness now on the stand had testified as to distances and driving times between the Jones Motor Company, Inc., terminal in Philadelphia and Jones Motor Company, Inc., terminal at Allentown, the following would apply: Over the routes traversed by Jones as mentioned in a previous stipulation the distance would be 96.2 miles, and the driving time three hours. Between the same points over U. S. Highway 309 lying wholly within Pennsylvania the distance would be 55 miles and the driving time 2 hours 5 minutes.

Over the Pennsylvania Turnpike between the same points, wholly within Pennsylvania, the distance would be 74.9 miles and the driving time one hour fifty minutes.

In so stipulating it is understood that Respondent does not agree that the distances and times over U. S. 309 and the Pennsylvania Turnpike are relevant to this proceeding" (N.T. 21-22).

The Pennsylvania Commission presented only the following evidence:

1. Mr. Duffy, who testified concerning his conversation with one of Jones' drivers during October, 1960. Mr. Duffy indicated that the driver informed him that he had been making the trip for approximately five years, five nights per week over the routes covered by the stipulation mentioned above (N.T. 29-30).

2. Witness John Staub's testimony was originally stricken (N.T. 40-41-42), but the Examiner, in his recommended Order, reinstated it in its entirety (Sheet 6). As the Examiner pointed out, the testimony was not related to any date mentioned in the Complaint (N.T. 38; Sheet 6). Otherwise, his testimony was merely cumulative to that given by Witness Duffy, a fact on which the Examiner commented in reversing his ruling (Sheet 6).

3. Witness Wetmore of Modern Transfer Co. (N.T. 43) testified as to his company's Pennsylvania intrastate operating authority and the location of its terminals. He added that U. S. Route 309, lying wholly within Pennsylvania was the route used by his company and was "the most practical and economical" *for his company to use* (N.T. 52), but that his company did use the Pennsylvania Turnpike in instances of bad weather (N.T. 55).

4. Witness Imhof of Highway Express Lines, Inc. (N.T. 55) identified his company's intrastate operating authority (N.T. 56), located his company's terminals and was of the opinion that U. S. 309, used by his company, was the most logical and economical route *for his company to use* (N.T. 58).

The foregoing was the only direct evidence offered in support of the Complaint. There was no evidence presented by Pennsylvania Commission with relation to any administrative or regulatory difficulties, violations, irregularities or bad faith on the part of Jones.

side the municipality in which its principal office is located. Federal Law is so drafted that the Comptroller of the Treasury, in granting approval for the opening of a branch banking facility in a city, town, or village, must act conformably with applicable state law on the subject. It was argued by Camden Trust that since under State law no other state bank could establish a branch bank in Delaware Township, no New Jersey Bank could establish a branch there. Accordingly, it became important to determine whether what the directors of Haddonfield National as individuals sought to have approved was the establishment of a branch bank of Haddonfield National, or the establishment of an entirely new bank. The court found it was the latter.

The record shows that the directors of Haddonfield National, after denial by the Comptroller of the Treasury of the bank's application to locate in Delaware Township, acting as individuals, invited its shareholders by letter to subscribe to shares in a new bank. The letter stated, *inter alia*, that the new bank, to be called Delaware Valley National Bank, would be an affiliate of Haddonfield National Bank and that its affairs would be conducted by the same management and under the same policies as the Haddonfield National Bank.

The application of the Haddonfield directors under the facts described above was termed by Appellant Camden Trust to be "on its face a manifest subterfuge to circumvent the provisions and purposes of the National Bank Act by attempting to introduce into Delaware Township a banking facility that will for all practical purposes constitute a branch facility of the Haddonfield National Bank". Approval by the Comptroller would, under these circumstances, it said, be beyond the Comptroller's authority and an abuse of his discretion.

The Court of Appeals for the District of Columbia Circuit, whose action, through denial of certiorari by this

Court, was not disturbed, affirmed the action of the District Court granting judgment for the Comptroller.

The Court rejected the argument of subterfuge saying, among other things:

> "Whatever weight is to be given to the appellant's legal argument, it is difficult to think of the Haddonfield directors' action as a 'subterfuge', at least in an invidious sense. On the contrary, the preliminary proceedings seem to have been open and notorious. Perhaps on that account the 'subterfuge' was alleged to be 'manifest'. The president of the Haddonfield National Bank on its letterhead notified all of its shareholders of the plan and the objective which the directors sought. Appellant protested orally and in writing to the Comptroller. The latter and the New Jersey Bank Commissioner corresponded concerning the project. It fairly may be said that we perceive nothing arcane or wrongfully covert in the effort . . ." (391 F. 2d at 523).

*Western Union Telegraph Co.* v. *Speight*, supra, also dealt with the question of bad faith to the extent that said case dealt with the motive of the telegraph company in transmitting its message from a North Carolina origin to a North Carolina destination via points in Virginia. Therein, it was stated at page 19:

> "The burden was on the plaintiff to make out her case. Moreover, the motive would not have made the business intrastate".

Finally, in *Service Storage and Transfer Co., Inc.* v. *Commonwealth of Virginia*, supra, this Court emphasized that Virginia had presented no direct evidence of bad faith, in these words:

> "It contends that petitioner's circuitous and unnecessarily long routes were a mere subterfuge to escape intrastate regulation and evade its jurisdiction. Aside from the testimony of highway officers as to the actual shipments, none of which is disputed, the Common-

> wealth's evidence consisted soley of maps substantiating its position that petitioner's routes were circuitous and often long, sometimes exceeding twice the shortest possible route. *However, it offered no direct evidence of bad faith on the part of petitioner* in moving its traffic through Bluefield, West Virginia". (Emphasis ours) (359 U.S. 171, 175)

**The Questions Raised by the Jurisdictional Statements Are Unsubstantial**

The Pennsylvania Commission contends that the questions presented are substantial in that the decision of the Court below conflicts with *Arrow Carrier Corporation* v. *United States*, 375 U.S. 452; that the Court below made findings at odds with the Commission; and that the Court below erred in not remanding the case to the Commission for further proceedings. Appellants Highway and Modern contend that the majority opinion embarrasses the Pennsylvania Commission's regulatory efforts; misinterprets the significance of the Examiner's Report; and restricts relief to a revocation proceeding..

These contentions lack merit.

The United States District Court for the District of New Jersey specifically distinguished the Opinion of the Court below in this matter. The Interstate Commerce Commission in its Motion to Affirm in *Arrow Carrier Corporation* v. *United States*, supra, stated at page 9:

> "The issue in *Jones* was whether the facts there supported the Commission's finding of subterfuge. On rehearing, the *Jones* court emphasized that its reversal of the Commission was based upon its evaluation of the evidence (App., infra, pp. 11-12). The district court in the instant case properly distinguished *Jones* on its facts (J.S. 12a-13a, fn. 1)".

The Court below properly pointed out that the Hearing Examiner made Findings of Fact which the Interstate Commerce Commission adopted. The Court agreed with

these Findings and concluded that those Findings did not constitute any direct evidence of bad faith. The Court below found logical reasons for the Jones' operation and found beyond dispute that the burden of proof of subterfuge had not been met.

The third contention of the Pennsylvania Commission with respect to remission of the record upon its request, is equally lacking in merit. The issue before the Court below was whether subterfuge had been established. The Court concluded it had not.

The contentions raised by Highway and Modern are unsubstantial. There is nothing in this record with respect to any administrative or regulatory burdens or difficulties experienced by the Pennsylvania Commission and none should be injected into this case by way of argument.

As previously stated, the Examiner in his Report made Findings of Fact which were adopted by the Commission and recognized as valid by the Court below.

The third contention of Appellants Highway and Modern is also not well taken. The instant proceeding hinged upon the burden of proof of subterfuge. The Court found that that burden had not been met.

## CONCLUSION

The question presented to the Court is Res Adjudicata. The transportation in question is clearly interstate commerce by specific statutory terms and has been so construed by the Courts. Moreover, the operation has been conducted pursuant to certificates issued by the Interstate Commerce Commission and is wholly without subterfuge. At no time did the Interstate Commerce Commission cite any Section of the Interstate Commerce Act which Appellee is said to have violated. The questions presented by the Appeal are not substantial and do not require the plenary consideration of this Court. With this view, the United States and the

Interstate Commerce Commission agree in their Memorandum filed herein, wherein they say: "The reasons for plenary consideration do not appear compelling in the light of this court's disposition of the Arrow litigation" (Page 5). Appellee requests this Court to affirm the Opinion of the Court below.

Respectfully submitted,

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